IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03/12/2002

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THE HONOURABLE MR.JUSTICE V.S.SIRPURKAR
AND
THE HONOURABLE MR.JUSTICE P.D.DINAKARAN

H.C.P.No.735 of 2002

Izadeen .. Petitioner

-Vs-

1. The State of Tamil Nadu
rep. by the Secretary to Govt.,
Public (SC) Department
Fort St. George, Chennai.

2. The Union of India
rep. by the Secretary to Govt.,
Ministry of Finance
Department of Revenue
(COFEPOSA Unit)
Central Economic Intelligence Bureau
Janpath Bhavan, Janpath
New Delhi.

3. The Superintendent of Central Prison
Central Prison, Chennai-3. .. Respondents

PRAYER: Petition filed under Article 226 of the Constitution of India for issue of Writ of Habeas Corpus for the relief as stated therein.

For Petitioner : Mr.K.A.Jabbar

For Respondents : Mr.I.Subramaniam
Public Prosecutor
for Respondents 1 and 3
Mr.C.Kulandaivelu
for Mrs.Vanathi Srinivas
A.C.G.S.C.,
for second respondent

:ORDER

(Order of this Court made by V.S.Sirpurkar,J.)

The petitioner has challenged the order passed under the provisions of Section 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, dated 24.1.2002, ordering the detention of the detenu.

2. The detenu was a passenger travelling from Colombo. After reaching Chennai Airport on 28.12.2001, he collected a checked in baggage bearing tag No.UL 281926. He had come by Srilankan Airlines Flight No.UL 121. This tag was in the name of one Noor Mohammed. The detenu started walking through the green channel. He was intercepted by an Intelligence Officer on suspicion that he was carrying some contraband. In the search, 10 Umbrellas were found and in the rods of those umbrellas as many as 238 small metallic yellow rods made of gold were found. They amounted to 1630 Grams of gold worth about Rs.7,40,834/-.

3. His statement was recorded, where he admitted that the bag, though was in the name of Noor Mohammed, belonged to him. His voluntary statement was recorded on the same day where he stated that he had visited India four or five times earlier; that he knows Sinhalese and Tamil to read and write; that he used to bring other materials like cloves and soaps, and used to carry clothes from here; that he had met a person named Noor Mohammed in Colombo Airport and he requested him to check in his baggage in the name of Noor Mohammed along with his two baggages and for this he was paid Rs.500/-. Accordingly, he had, as per the request of Noor Mohammed, registered his baggage along with Noor Mohammed's two baggages in the name of Noor Mohammed and gave the luggage tag. He then admitted that he took the flight to Chennai and in Chennai Airport he collected his one checked in baggage. Further statement was also recorded on the same day wherein he admitted his connection with Noor Mohammed. On these grounds, the order seems to have been passed rendering him to be a smuggler and with a view to prevent him from taking part in the smuggling activities.

4. It is significant that in paragraph (v) of the detention order it is stated: "No complaint of ill treatment was made by you. Your Srilankan passport was ordered to be retained to judicial custody."

5. After the order was passed, the petitioner who was in the judicial custody and who was trying to obtain bail all through by making applications after applications was detained under the preventive detention. There were efforts on his part to retract the statement which he had given and he also sent a representation to the authorities. It is this order of detention which is challenged in the present writ petition.

6. Mr.K.A.Jabbar, learned counsel for the petitioner urged that this was a case of the failure on the part of the detaining authority to apply mind to the fact that the passport of the petitioner was retained and therefore, the order is a result of non-application of mind and non-consideration of the material facts.

7. In support of his argument, the learned counsel points out that the fact that the passport was ordered to be retained to judicial custody was undoubtedly noted by the detaining authority. The learned counsel, painstakingly, took us through all the grounds and pointed out that after this fact of the detention of the passport was noted, the concerned authority has further noted in paragraph (xii): "The Customs in their reply dated 23.1.2002 addressed to your brother Naushad have stated that you had given in your voluntary statement immediately after the seizure, which is in your own hand admitted that the baggage belonged to you, though it was booked in the name of Thiru Noor Mohammed; that you had travelled together with Noor Mohammed number of times to Colombo; that a copy of the mahazar was given to you by the Customs department; and that the dropping of case proceeding against you cannot be accepted".

8. The learned counsel also invited our attention to paragraphs 5 and 6 of the grounds, which are as under:

" 5. The State Government are also aware of the fact that you are in the Central Prison, Chennai as remand prisoner and there is likelihood of you being released on bail. The State Government are satisfied that there is likelihood of your indulging in the above said prejudicial activities again while on bail and there is a compelling necessity to prevent you from indulging in such activities. The State Government, therefore, consider that it is necessary to detain you under Section 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

6. The State Government are also satisfied that on the facts and materials mentioned above, if you are released on bail, you will indulge in such activities and that further recourse to normal criminal law would not have the desired effect of effectively preventing you from indulging in such activities. The State Government, therefore, consider that it is necessary to detain you under Section 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 with a view to preventing you from smuggling of goods in future."

9. The learned counsel, however, points out that there is absolutely nothing in the whole grounds to suggest that the detaining authority was alive to the fact that the petitioner's passport was already retained to judicial custody and therefore, it was impossible for him to have engaged himself in smuggling activities. According to the learned counsel, the detaining authority has not considered the effect of the retention of the passport at all.

10. The gravamen of the contention is that whereas the detaining authority has specifically stated that the release on bail of the detenu would give him a further opportunity to do and continue his nefarious smuggling activities. There is nothing in paragraphs 5 and 6 or for that matter anywhere to suggest that the effect of the retention of the passport was considered by the detaining authority. The learned counsel says that this amounts to non-application of mind, particularly because the whole detention order is on the ground that the concerned detenu has been travelling in and

out of India only for the purpose of smuggling.

11. The learned counsel very heavily relies upon the decision of the Supreme Court in RAJESH GULATI Vs. GOVERNMENT OF NCT OF DELHI reported in 2002 (83) ECC 281 (SC). As per this decision, according to the learned counsel, the Supreme Court found that the withdrawal or retaining of the passport was a relevant circumstance. The learned counsel pointed out that in paragraph 15 of the judgment, the Supreme Court has clearly expressed that the withdrawal of the passport was a relevant circumstance and that the conclusion drawn by the detaining authority and some statements made while stating the reasons for detention were in the nature of pure speculation on the part of the detaining authority. It will be better to quote paragraph 15 of said judgment:
"... 15. In other words according to the detaining authority the prime mover for the smuggling activity was the proprietor of M/s.B.D. Denim. The appellant at the worst was a pawn in the hands of another. The likelihood of the appellant indulging in smuggling activities by the appellant was in any case effectively foreclosed by the retention of his passport by the customs department. The detaining authority noted that the appellant's passport was with the customs department and yet he said "but you are likely to travel clandestinely for the purpose of smuggling". Now one of the instances of smuggling by the appellant as stated in the impugned detention order describe the appellant as having travelled without a passport for the purpose of smuggling. The conclusion that despite the absence of his passport the appellant could or would be able to continue his activities is based on no material but was a piece of pure speculation on the part of the detaining authority. These findings are sufficient to invalidate the impugned detention order and it is not necessary to consider the other issues raised by the appellant."

12. The learned counsel further pointed out that similar to the reported decision, the petitioner was also described to be making trips in and outside India and had been in contact with one Noor Mohammed who was more or less responsible for the activities of the petitioner. The learned counsel pointed out the further similarity that the petitioner's passport was also withdrawn by the Customs Department and therefore, there was no question of petitioner being able to conduct any activity much less of smuggling and therefore, according to the learned counsel there was no basis for the apprehension of the detaining authority that the petitioner was likely to continue his smuggling activities or that he could, in fact, continue such an activity of smuggling.

13. In short, the contention raised is that the detaining authority did not take into consideration the fact that the whole pattern of the smuggling activity depended upon the petitioner's travel in and outside India along with Noor Mohammed, which undoubtedly require the passport, and since the passport was retained in the judicial custody by the order of the Court, there was no possibility of the petitioner continuing with the smuggling activity and that this suggestion should have been apparent in the grounds stated in support of the detention order.

14. As against this, the learned senior counsel and Public Prosecutor, Mr.I.Subramaniam, relied on the decision of the Supreme Court in M.AHAMEDKUTTY Vs. UNION OF INDIA reported in 1990 SCC (Cri) 258, and more particularly on paragraph 18 at page 269. The paragraph is in the following terms:

"... 18. The next submission of counsel was that the detaining authority should have realized that the seizure of the detenu's passports was by itself sufficient to restrain the detenu's smuggling activities, if any, and refrained from passing the order of detention. We see no force in this contention. This was no doubt one of the factors that the detaining authority should have taken (and did in fact take) into account but it was for him to assess the weight to be attached to such a circumstance in arriving at his final decision and it is not open to us to interfere with the merit of his decision. We, therefore, reject his contention of Mr.Vaidyanathan."

15. The learned senior counsel says that the detaining authority was undoubtedly aware of the fact that the passport was impounded or retained in the judicial custody, as the case may be, by the Department, and if, in spite of that, the detaining authority chose to pass the order of detention, then it must be presumed that the detaining authority had taken into consideration this factum of the seizure of the passport in judicial custody and in spite of that it was satisfied in favour of the need of the detention.

16. The learned Public Prosecutor also expressed that if the contention of the learned counsel for the petitioner is accepted, it would be a thumb-rule that in all the cases involving smuggling where passport is impounded or where the detenu is deprived of his passport, there would be no question of ordering any preventive detention.

17. Considering the rival submissions, we are of the clear opinion that in this case there is a specific pattern of smuggling described in the grounds. That pattern of smuggling is to be seen in the statement of the detenu to the effect that he had travelled four or five times in and outside India either with or without Noor Mohammed and that he used to carry the contraband goods only at the instance of Noor Mohammed. This suggests that the activity of smuggling, at least in the case of the petitioner, was essentially connected with the travels in and outside India. There is no other activity either suggested or attributed to the petitioner. If this was so, then while making up the mind for passing the order, it was undoubtedly essential for the detaining authority to say something about the passport having been impounded and the result of the impounding of the passport by the Court. Unfortunately, that is not to be seen in either paragraphs 5 or 6 or for that matter anywhere in the grounds.

18. There is no doubt that in M.AHAMEDKUTTY case, the Supreme Court held that it was for the concerned authority to weigh this fact one way or the other. However, we cannot forget the observation of the Supreme Court in that paragraph itself, which is to the following effect:

"This was no doubt one of the factors that the detaining authority should have taken (and did in fact take) into account but it was for him to assess the weight to be attached to such a circumstance in arriving at his final decision

and it is not open to us to interfere with the merit of his decision".

19. Therefore, the fact of the impounding of the passport or the detenu deprived of the passport was undoubtedly a very relevant fact. What we have before us is, only the fact that the passport was retained in the judicial custody. That, in our opinion, would not be taking into consideration the result of the deprivation of the detenu of his passport. In our opinion, the concerned authority should have been more elaborate and should have shown that it had applied its mind to this particular circumstance. When we see paragraphs 5 and 6 on page 7 of the detention order, all that is stated is that though the petitioner was in custody, he was likely to be released on bail and if he was released on bail, he was bound to indulge in such activities and that further recourse to normal criminal law would not have the desired effect to effectively prevent him from carrying on with these activities. Therefore, the most relevant fact that weighed with the detaining authority to take the decision to detain was the likelihood of the petitioner to be released on bail. At the same time, when the backdrop of the detention was a patternised smuggling activity and the deprivation of the passport was bound to put a complete stop to that pattern, it was imperative, in our opinion, for the detaining authority to take that fact also into consideration and there is nothing in the grounds that that fact has been taken into consideration. Therefore, in our opinion, in the facts of this case, the retaining of the passport was of paramount importance and it was liable to be taken into consideration and not having taken that into consideration, the detaining authority has failed to take into consideration the very material fact, which has affected his thinking process and ultimately the decision. We hasten to add that we should not be taken to mean that in all the cases where the passport is impounded, the mentioning about the same is a must. We are particularly taking this view, in view of the patternised smuggling activity in this case. Even a cursory look at the grounds would suggest that the detaining authority has not applied its mind to this vital fact of the deprivation of the detenu from his passport. In that, the detention order suffers and is vitiated. In view of the fact that we are allowing the petition on this ground alone, we do not deem it necessary to go to any other point and the learned counsel also withdraws his arguments on the other points. The petition is allowed. The detenu be released forthwith, unless he is required in any other matter. Rule is made absolute. No costs. Consequently, connected H.C.M.P.No.164 of 2002 is closed.

Index: Yes
Internet:Yes

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